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In the Supreme Court of the United States.

OCTOBER TERM, 1966

No. 514

MANJA T. BRONNER,
PETITIONER,

v.

ARTHUR L. GOLDMAN ET AL.,
RESPONDENTS.

BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

MANJA T. BRONNER,
Pro se.
418 Boylston St.,
Boston, Mass.

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BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Argument

1. PETITIONER HAS COMPLIED WITH RULE 23 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

The requirement of Rule 23 as to the brevity of the statement of material facts of the case and the argument in support of the reasons relied upon for the allowance of the writ of certiorari can be applied only in context of the

number and complexity of the issues involved. Where, as in the case sub-judice, review of six substantial questions of federal law and numerous aspects thereof is sought, the required "brevity" is plainly of a different dimension than that which governs a case of lesser importance or magnitude.

* * * * *

Although petitioner believes that the basis for federal jurisdiction in the court of first instance has already been set forth in compliance with sub-section (g) of the Rule, the following is intended to specify more fully such basis:

Violation—either directly or indirectly by virtue of aiding and abetting, conspiracy and other participation or acting with knowledge of the violations of the petitioner's broker and investment adviser—of the following provisions of federal securities legislation and rules and regulations thereunder: —Securities Act of 1933, Section 11 (15 U.S.C. §77 k); Section 12(2) (15 U.S.C. §77 l (2)); Securities and Exchange Act of 1934, Section 7(a)(c) and (d) (15 U.S.C. §78g(a)(c) and (d)); Section 8(a)(c) and (d) (15 U.S.C. §78h(a)(c) and (d)); Section 9 (15 U.S.C. §78 (i)); Section 10(b) (15 U.S.C. §78j (b)); Rules 8c-1 and 10b-5 of the Securities and Exchange Commission (17 C.F.R. §240.8c-1 and §240.10b-5); Regulation T of the Board of Governors of the Federal Reserve System (§220.2(c) and §220.7); Investment Advisers Act, Section 7 (15 U.S.C. §80b-5); Sections 8 and 9 (15 U.S.C. §80b-6).

Imputation of liability under the "control" provisions; Securities Act of 1933, Section 15 (U.S.C. §77o); and the Securities and Exchange Act of 1934, Section 20 (15 U.S.C. §78t).

Imputation of liability under federal "aider and abettor" statutes; 62 Stat. 684, 717 (18 U.S.C. §2); 62 Stat. 701 (18 U.S.C. §371).

Imputation of liability by virtue of the application of

common law principles of agency, i.e., respondeat superior, and general concepts of equity and restitution to federal substantive law.

Imputation of liability by virtue of respondents' knowledge of the statutory wrongs of the petitioner's broker and investment adviser; Securities and Exchange Act of 1934, Section 29(b) (15 U.S.C. §78cc(b)); Investment Advisers Act, 54 Stat. 856 (15 U.S.C. §80b-15).

General jurisdiction sections of federal securities legislation; Securities Act of 1933, Section 22 (15 U.S.C. §77v); Securities and Exchange Act of 1934, Section 27 (15 U.S.C. §78aa); Investment Advisers Act, 54 Stat. 856 (15 U.S.C. §80b-14).

2. THE FACTS ASSUMED BY THE PETITION FOR A WRIT OF CERTIORARI ARE SUPPORTED BY THE RECORD AND THE FINDINGS OF BASIC FACTS.

Respondents broadly contend that "petitioner assumes as facts matters which were decided adversely to her—" and that she seeks "in effect a trial *de novo* on the facts in this court (pp. 2-3). Thus, it is urged that respondents did not *wrongfully* recommend to the broker that he arrange for his loan to be taken over by the petitioner. But the Circuit Court assumed that the "recommendation that Homsey follow such a course [were] (was a) violation[s] of restrictions upon broker participation" and that under such circumstances criminal sanctions may be applicable "to a broker or *anyone who aids and abets his misconduct.*" (emphasis supplied) (Opinion, p. 8). The record also makes plain that the broker's common law and statutory wrongs toward the petitioner were committed in *furtherance* of such recommendation. And in this vein, the Circuit Court stated: —"To this end, Homsey turned to the plaintiff." (Opinion, p. 2). This Court, consequently, is not being asked to find basic facts but, on the contrary,

is respectfully requested to *rule* that respondents, as a matter of *law,* are civilly liable for the losses sustained by the petitioner as a result of their recommendation to the broker to commit an illegal act and for such other illegal acts committed by the broker in *furtherance* of such recommendation.

Petitioner has urged that respondents had notice of facts indicating to them that the American Motors transaction was an improper and losing venture.[1] The *fact* that respondents' recommendation was prompted by their concern as to Homsey's ability to repay was found by both lower courts (R. 378; and Opinion, p. 2). The *fact* that the price paid by the petitioner was substantially higher than the market value of the American Motors shares was stipulated and the *fact* that respondents were aware of this price differential is self-evident (Petition for Writ of Certiorari, pp. 12 and 15). Accordingly, the conclusion that petitioner seeks this Court to reach, to wit, that respondents engaged in "conduct tempting dishonor" and failed to exercise good faith, raises a question of law and not an issue of fact; and, the conflict between such *conclusion* and those drawn by the lower courts does not stem from an assumption of *facts* in variance to those found by said courts, but from a difference of legal interpretation.

3. Conclusions or Findings of Ultimate Facts Are Subject to Review by This Court

In Re The E. A. Packer, 140 U.S. 360, 11 S. Ct. 794, 795 (1891)

Fiske v. *State of Kansas,* 274 U.S. 380, 47 S. Ct. 655, 656, 657 (1927)

[1] The district court fastidiously avoided making reference to this issue even though petitioner, although not so required, made request for findings of fact on the issue (R. 355, #7 and 8). The Circuit Court *concluded* that respondents had no such notice.

Baumgartner v. *United States,* 322 U.S. 665, 64 S. Ct. 1220, 1243, 1244 (1944)

"And this Court will review the findings of facts where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the Federal question, to analyze the facts. *Northern Pac. R.* v. *North Dakota,* 236 U.S. 585, 35 S. Ct. 429; *Aetna Life Ins. Co. Dunken,* 266 U.S. 389, 394, 45 S. Ct. 129."

Fiske v. *United States* (ubi supra)

Respondents' participation in the statutory wrongs of the broker and their liability ensuing therefrom constitute *legal* issues capable of determination upon the undisputed *basic facts, documentary evidence, admissions* and *stipulations* and the resolution of such issues does not require an inquiry into the credibility of witnesses. Issues of such a nature are subject to review; cf, *International Minerals & Chemical Corp.* v. *Moore,* 361 F. 2d. 851 (5 Cir., 1966).

The Circuit Court's conclusion that respondents had no notice as to the impropriety of the American Motors transaction was erroneous for the further reason that the Circuit Court, in spite of the statutory language to the contrary,[2] implicitly assumed that the petitioner had the bur-

[2] Section 12(2) [15 U.S.C. §771(2)] provides "—and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission shall be liable—"; and Section 15 [U.S.C. §77o] provides "—shall also be liable jointly and severally with and to the same extent as such controlled person—unless the controlling person had no knowledge of or reasonable ground to believe in the existence of facts by reason of which the liability of the controlled person is alleged to exist." Section 20 of the Securities and Exchange Act [15

den of proof to show such notice. And the conclusions that petitioner "has utterly failed to prove that this payment did not cover the items now in suit" (Opinion, p. 6) and that "plaintiff has failed to prove that—any unauthorized withdrawal of any of her collateral has taken place" [R. 384] also assumed erroneous impositions of the burden of proof.[3]

> "... if the trier of facts labored under such a serious legal misapprehension as to which party bore the burden of proof, its ultimate fact findings are not clothed with the insulation of Rule 52(a) and may be disregarded—"
>
> *Fulton National Bank* v. *Tate,* 363 F. 2d. 562, 566, 567 (5 Cir., 1966)
>
> See also; *United States* v. *Intermountain Furniture Mfg. Co.,* 363 F. 2d. 554, 557 (10 Cir., 1966)

Conclusions of the lower courts were not predicated upon findings of basic facts as required by Rule 52 of the F.R.-

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U.S.C. §78t] has no "unless" clause such as contained in Section 15 (supra). Consequently the language of Section 28(a) [15 U.S.C. §78bb(a)] renders the existing common law, which imposes liability for all conduct in *furtherance* of the unlawful recommendation —regardless of knowledge of such conduct—applicable; *Nye & Nissen* v. *United States*, 336 U.S. 613, 69 S.Ct. 766, 770 (1949); *Int. Brotherhood of Electrical Workers* v. *N.L.R.B.*, 181 F. 2d. 34, 38, 39 (2 Cir., 1950); A.L.I., Rest. of Law, Torts, Vol. 4, §876 and comment 7 thereof; Cooley on Torts, 4 ed., Vol. 1, §§75 and 85.

[3] Payment, of course, constitutes an affirmative defense placing the burden of proof thereon upon respondents both under state and federal law. With respect to a complicated [R. 163] accounting, state law imposes upon the pledgee the burden of proof to account; *Pierce* v. *Life Assur. Soc.*, 145 Mass. 56, 60, 12 N.E. 858, 862; *Little* v. *Phipps*, 208 Mass. 334, 335, 94 N.E. 260, 262; *Milbank* v. *J. C. Littlefield, Inc.*, 310 Mass. 55, 36 N.E. 2d. 833; and no finding was even made as to whom respondents delivered the securities, conceded to have been received by them; 600 and 2100 share blocks of American Motors, 100 shares of Jones Laughlin Steel Corp. See Petition for Certiorari, pp. 28, 29.

C.P. and consequently carry no weight. Thus, a fortiori, they are subject to review. The trial court, for example, made no findings as to (1) respondents' knowledge of facts alerting them to Homsey's wrongdoings, (2) their disposition of petitioner's securities conceded to have been received by them as collateral, (3) their good faith, qua pledgees, in receiving securities registered in the name of the petitioner as collateral for their loans to Homsey, (4) the negotiability of the latter securities. And no findings of facts were made by the trial court to support its conclusion that respondents properly accounted to the petitioner. Nor were there facts found, as required by the Rule, *Kweskin* v. *Finklestein*, 223 F. 2d. 677, 678, 679 (7 Cir., 1955), to support the trial court's conclusion, adopted by the Circuit Court, that petitioner had failed to sustain the burden of proof of showing that a fraudulent scheme had been inflicted upon her.

4. Respondents Have Erroneously Characterized the Opinions of the Courts Below

Contrary to the assertion of respondents, the Circuit Court neither explicitly, nor implicitly, ruled "that the respondents did not violate the Securities Exchange Act" (p. 8); the Circuit Court assumed exactly the contrary, (Opinion, p. 8). And the Circuit Court did not hold, as respondents state, that "Since they were not brokers they could not violate Regulation T" but assumed that "defendants' recommendation that Homsey follow such a course of action [were] (was a) violation[s] of restrictions upon broker participation in such a transaction as this."[4] (Opinion, p. 8).

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[4] It is of note that the Board of Governors of the Federal Reserve System (Federal Reserve Bulletin 950 (1933)) has stated that anyone participating in a violation of Regulation T may be guilty; cf, 2

Neither did the Circuit Court "readily accept" that petitioner and her broker "were engaged in a joint venture" (p. 9). Although the district court drew such a *conclusion,* the Circuit Court, in response to petitioner's arguments—that (1) the terms of the agreement did not constitute a joint venture under either state or federal law, (2) and any such "joint venture" was void or voidable by virtue of the broker's material omissions (R. 380, 381) and (3) that the existence of any such possible "joint venture" was immaterial as it was specifically proscribed by Regulation T and could not, in any event, constitute grounds for an estoppel [5]—refused to make reference to a "joint venture." [6]

And also contrary to the suggestion of respondents, the courts below were not in agreement in determining the legal consequences ensuing from the conduct of a party who "merely" (Opinion, p. 8) *causes* a broker to arrange *illegally* a "non-regulated" purpose loan for a customer

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Loss, Securities Regulations, 2d Ed. 1961, p. 1263. And this Court only a few months ago in *U. S.* v. *Price*, 86 S. Ct. 1152, 1156, 1157 (1966) has ruled that conduct prohibited by statute renders a person liable thereunder who is not within the class of individuals encompassed by the statute if "he is a wilful participant in joint activity" with an individual whose conduct is proscribed under the statute or if he "took advantage of participation" of such latter individual. See also, *United States* v. *Lester*, 363 F. 2d. 68, 72, 73 (6 Cir., 1966) and 1951 U.S. Code Cong. Service, pp. 2578, 2583.

[5] *Sola Electric Co.* v. *Jefferson*, 317 U.S. 173, 63 S. Ct. 172 (1942); *Kaizer-Frazer Corp.* v. *Otis & Co.*, 195 F. 2d. 838, 843 (2 Cir., 1952); *Remar* v. *Clayton Securities Corp., et al.*, 81 F. Supp. 1014, 1017 (D. Mass., 1949); *Reader* v. *Hirsch*, 197 F. Supp. 111 (S.D.N.Y., 1961).

[6] Referring to the American Petrofina transaction, the Circuit Court said: "—Moreover, on one occasion she had borrowed money to finance the purchase of stock in a profitable [?] venture in association with Homsey." (Opinion, p. 2). This hardly supports respondents' statement that the Circuit Court ruled that the petitioner was engaged in a "joint venture" with respect to the American Motors transaction.

of the broker. The district court ruled that such conduct had the effect of rendering respondents, *civilly* liable [denial of respondents' Motion to Dismiss #1 (2) (R. 14, 15)] and relied upon Remar v. Clayton Securities (supra) therefor. But unlike the Circuit Court, which assumed that respondents' recommendation to the broker constituted an aiding and abetting and which further assumed that such conduct had the effect of rendering respondents liable *criminally* or subject to administrative disciplinary sanctions, the district court refused to rule that such recommendation constituted an aiding and abetting of the broker's offense. The Circuit Court refused to rule that grounds for *civil* as opposed to *criminal* liability existed in light of its ruling that the *extension* of the loan itself was legal. Thus, it disregarded the language of Regulation T, which condemns participation in the *arranging* of *any* purpose loan (regardless of the source of the funds) on terms other than the participating broker himself could legally extend.

No authority was cited, nor was any justification offered for the Court's suggestion that Regulation T should be solely enforced "through the various administrative disciplinary sanctions provided by the Act, or by injunctive relief or even criminal sanctions—" (Opinion, p. 8) to the exclusion of private action and, to the contrary, the right of a private person to seek relief has been upheld even where the Securities and Exchange Commission had *already* exercised jurisdiction over the same civil matter; *Securities and Exchange Commission* v. *Long Island Lighting Co.*, 148 F. 2d. 252, 257 (2 Cir., 1945). Moreover, no reason was offered why the possibility of administrative enforcement should any more preclude private relief in a case involving a "non-regulated" loan than in one involving a "regulated" loan or why an "aider and abettor"

to a violation of the margin provisions should enjoy an immunity to civil action not available to a direct violator.[7]

5. The Position of the Board of Governors of the Federal Reserve System Does Not Support Respondents' Contentions

Respondents urge that the claimed inaction of the Board supports their position that a private money lender cannot directly or indirectly violate Regulation T.

But as has already been pointed out the unanswerable fact is that the Board has stated that any one who aids and abets a violation of Regulation T stands on the same footing as a direct violator thereof.

And failure of the Board to have elucidated the *statutory* meaning of the term "broker" or to have decided whether a lender not specifically mentioned by the regulations may be encompassed by the *Act itself* (see Petition for Writ of Certiorari, p. 24, footnote 28) does not support respondents' position. *F.T.C.* v. *Dean Foods Company*, 86 S. Ct. 1738, 1746 (1966).

Conclusion

In view of the reasons set forth in the Petition for a Writ for Certiorari and the additional grounds set forth herein, it is respectfully submitted that the writ should issue.

Respectfully submitted,

Manja T. Bronner,
Pro se.
418 Boylston St.,
Boston, Mass.

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[7] *Int. Brotherhood of Electric Workers* v. *N.L.R.B.*, (supra) and authorities et seq. cited in footnote 2.